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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DE FORTE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Attica State Prison, Attica, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Frank DeForte* v. *Mancusi*. The judgment was entered on June 28, 1967 and a timely motion for rehearing or rehearing in banc was denied on August 25, 1967. Subsequent to the initiation of this habeas corpus proceeding in the United States District Court for the Western District of New York, the respondent was released on parole. The final order of the District Court, entered on September 21, 1967, after the return of the mandate of the Court of Appeals, directs that the respondent be enlarged upon his own

recognizance pending any review by this Court. The order further provides that, in the event of reversal, the respondent be returned to state custody to complete the unexpired portion of his sentence, but that otherwise the respondent shall be unconditionally discharged from custody unless, within a reasonable time, the State of New York grants him a new trial.

Citations to Opinions Below

The opinion of the United States District Court for the Western District of New York denying the respondent's application for a writ of habeas corpus is reproduced as Appendix "A" to this petition and is reported at 261 F. Supp. 579. The opinion of the United States Court of Appeals for the Second Circuit reversing the order of the District Court is reproduced as Appendix "B" to this petion and is not yet reported. The orders of the Court of Appeals denying a timely motion for rehearing or rehearing in banc were entered on August 25, 1967 (Appendix "C"). The order of the District Court entered on September 21, 1967, after the reversal by the Court of Appeals, is reproduced as Appendix "D" to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Does a seizure of labor union records by the police pursuant to a subpoena duces tecum violate the personal rights of a union official to be secure from unreasonable searches and seizures where the records were seized from the union offices and were admittedly not the personal property of the union official and where the union official was not charged with a possessory crime?

Should new rules in Fourth Amendment cases which extend to union or corporate officials standing to object to searches of union or corporate premises and seizures of union or corporate records be enunciated in a federal habeas corpus proceeding challenging a final state court judgment of conviction?

Statement of the Case

The respondent, a vice-president of Local 266 of the Teamsters Union, was indicted, along with two other union officials and twelve other defendants, by a grand jury of the County of Nassau, State of New York, for Conspiracy (N. Y. Penal Law § 580), Coercion (N. Y. Penal Law § 530) and Extortion (N. Y. Penal Law §§ 850 and 851). The essence of the indictment's charges was that the defendants, using the Union Local as a facade and shield, were monopolizing the juke box industry in the metropolitan New York area by organizing the owners of music machines and juke boxes and compelling them to pay tribute in the guise of union initiation fees, dues and monthly assessments.

Prior to the trial, a subpoena duces tecum was issued to Local 266 by the Nassau County District Attorney's office commanding that the union forthwith produce certain of its books and records at the County Courthouse, Mineola, New York. There was no evidentiary hearing in the District Court and no separate motion to suppress or hearing in the state courts, but the facts surrounding the alleged illegal search and seizure are not in dispute.

The subpoena was served upon the union at its offices. The respondent, as a vice-president of the union, had a desk in the one large room which comprised the union office. There were other desks used by other union officials in this room. The respondent was present at the union office when the subpoena was served. The union refused to comply with the subpoena and surrender the books and

records which it called for. The state officials who served the subpoena thereupon, over the protests of certain union officials including the respondent, seized certain union records including the Charter, bank books, deposit slips and checkstubs of the union. The respondent, in his capacity as an official of the local, had participated in the preparation of many of the union records which were seized, but it is conceded by the respondent that none of the items seized were his personal property. It does not appear, and the respondent has never maintained, that the union records were seized either from the respondent's desk in the common room or from any other area in the union office set aside for the exclusive personal use of the respondent. There was no apparent effort by the union to obtain return of any of the seized union records and a substantial portion of them were introduced into evidence at trial.*

The respondent and two of his co-defendants were convicted by verdict of the jury and the respondent was sentenced on June 21, 1960 to state prison for a term of three to five years. The judgment of conviction was affirmed by the Appellate Division of the New York Supreme Court, that Court holding that the defendants could not invoke the Fourth Amendment to the Constitution with respect to the union records since they were not the personal papers and effects of the defendants, who had possession of them merely in a representational rather than a private capacity. *People* v. *DeGrandis, et al.*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.). The New York Court of Appeals affirmed without opinion, *People* v. *DeGrandis, et al.*, 12 N. Y. 2d 812, 197 N. E. 2d 130, and amended its remittitur to indi-

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* Although the Court of Appeals concluded that the mere fact that these records were offered and admitted into evidence demonstrated their importance to the State's case, it is noteworthy that the prosecution argued in the state appellate courts that these items did not prove any facts which were denied or disputed by the defendants in the course of the 6,000 page trial record. *Cf., Chapman* v. *California*, 386 U. S. 18.

cate that it had held that no individual rights of the defendant had been violated by the alleged illegal search and seizure of the union records. 12 N. Y. 2d 946, 188 N. E. 2d 794. This Court denied certiorari on October 14, 1963 (375 U. S. 868).

Thereafter, the respondent sought a federal writ of habeas corpus on the ground of alleged coercion of the jury. The denial of the writ was unanimously affirmed by the Court of Appeals for the Second Circuit (335 F. 2d 173). The respondent, who was represented by the same counsel who prosecuted his state appeals, made no challenge to the seizure of the union records in that proceeding. See, 28 U.S.C. § 2244(b).

However, the respondent then sought another federal writ of habeas corpus, this time on the ground that the Fourth Amendment to the Constitution prohibited the introduction into evidence of the union's books and records which were seized when the union refused to produce them as required by the subpoena. The United States District Court for the Western District of New York (HENDERSON, J.) concluded that the standards enunciated in this Court's decision in *Jones* v. *United States,* 362 U. S. 257, did not apply to non-possessory crimes and would be singularly inappropriate if applied as a constitutional mandate to cases involving corporate or union books and records. Accordingly the District Court held that the respondent's constitutionally protected rights were not violated by the search of the union offices and the seizure of the union records. In reaching this decision the District Court followed a long line of decisions by this Court and by the Court of Appeals for the Second Circuit which emphasize the personal nature of Fourth Amendment rights. The District Court refused to follow the decision of the Court of Appeals for the Fifth Circuit in *Henzel* v. *United States,* 296 F. 2d 650, which reached a contrary result.

On appeal the Court of Appeals for the Second Circuit reversed and directed that the writ of habeas corpus issue. The Court observed that *Jones* v. *United States, supra,* did not formulate any affirmative tests for standing in cases such as this and concluded that decision must be made on a case-by-case basis. The Court of Appeals found that prior decisions of this Court, relied upon by the District Court, which declined to extend Fourth and Fifth Amendment rights in corporate or union records to corporate or union officials, were inapplicable under the circumstances of this case. It held that the respondent was entitled to suppression of the union books and records because the search was "directed at" him and invaded his personal right of privacy since it occurred at his place of business; because he was lawfully on the premises when the search and seizure occurred; and because he had substantially contributed to the preparation of a substantial portion of the books and records that were seized.

Reasons for Granting the Writ

1. The decision below represents a significant departure from prior decisions of this Court.

It has long been settled in this Court that a corporate officer has no constitutional privileges with respect to corporate books and records and accordingly cannot refuse, on grounds of self-incrimination, to produce the books and records of the corporation. *Hale* v. *Henkel,* 201 U. S. 43. Emphasizing that corporate books and records of which a corporate officer is the custodian do not assume the character of private papers of the custodian, the Court has held that a corporate officer has no personal right to resist honoring a subpoena duces tecum commanding that corporate books and records be turned over to duly authorized public officials. *Wilson* v. *United States,* 221 U. S. 361. *Cf., Owen* v. *Kennedy,* 11 L. Ed. 2d 18. The rule is

the same whether the corporate officer attempts to invoke a Fifth Amendment privilege or to claim a violation of his personal Fourth Amendment rights since the application of both amendments in cases involving corporate records is limited to any rights which the corporation may have and does not confer upon corporate officers any personal rights in such records. *Essgee Co.* v. *United States,* 335 U. S. 151; *Shapiro* v. *United States,* 335 U. S. 1. The same rule has been applied with respect to labor unions in *United States* v. *White,* 332 U. S. 694, where this Court held that a union official had no standing to object on constitutional grounds to the compulsory production of union records since none of the records were his own private papers.

The unmistakable impact of these decisions, which recognize the interplay of the Fourth Amendment's "protection of the privacy of the individual, his right to be let alone" and the Fifth Amendment's "protection of the individual against compulsory production of evidence to be used against him", *Davis* v. *United States,* 328 U. S. 582 at page 587, is that corporate or union records are in no sense clothed with a right of privacy or a privilege on behalf of any corporate official. The Court below, nevertheless, concluded that the respondent had a sufficient personal interest in the union records, which were concededly not his property, to confer standing upon him to object to their seizure from the union pursuant to the subpoena. It thus extended the application of the Fourth Amendment far beyond the protection of the "sanctity of a man's home and the privacies of life", *Boyd* v. *United States,* 116 U. S. 616 at page 630, to permit the respondent successfully to assert as a *personal* defense the right of the union to be secure from unreasonable searches and seizures of its (not the respondent's) "papers and effects". This result was achieved by an interpretation of *Jones* v. *United States,* 362 U. S. 257, which goes far beyond both the holding of that case and the clear rationale of that holding.

In *Jones* the defendant was tried for and convicted of possession of narcotics. Prior to trial he moved to suppress narcotics and narcotics paraphernalia on the ground that the warrant pursuant to which this evidence was seized had been issued without probable cause. The defendant did not allege ownership of the seized items and the testimony on the motion to suppress revealed that the evidence was seized from an apartment belonging to a friend of the defendant who had given the defendant his own key and permitted him to use the apartment. The defendant kept some clothing in the apartment, had used his key to gain admission on the day of the search and was in the apartment at the time of the arrest and search. The lower federal courts had held that the defendant lacked standing to suppress the evidence since he had not alleged ownership of the property seized and was at most a guest or invitee in the apartment. This Court held that the defendant did have standing to object to the search and vacated the conviction.

The Court's reasoning began with the assumption that "restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and security of property" and accordingly that anyone objecting to a search must establish "that he himself was the victim of an invasion of privacy", 362 U. S. at page 261. This prerequisite was not eliminated by other language in the *Jones* decision, as the Court below seemed to assume. Quite the contrary, this Court recognized that prosecutions for possessory crimes present a "special problem", 362 U. S. at p. 261, because of the dilemma facing an accused if he must allege ownership or a possessory interest in the property seized in order to make a prima facie showing of standing to object. Thus, the Court held that the necessity for demonstrating an interest in the property seized, "which is ordinarily required when standing is challenged", 362 U. S. at page 263, must, in fairness to the defendant, be dispensed with in cases involving possessory crimes. This, of course, is the ***holding*** of *Jones*.

But the Court went on to observe that, even if *Jones* had not involved a possessory crime, the defendant had established "the legally requisite interest in the premises" 362 U. S. at page 263. And here it is important to emphasize what the Court held and what the Court did *not* hold. The Court rejected prior lower court decisions which had resolved questions of the legally requisite interest in the premises by resorting to distinctions made in the common law of property between "guests", "invitees", "licensees", etc. The Court thus held that if an individual were could not be denied standing solely because his presence could be described by a common law proprietary category of less than an owner. The Court has recently interpreted *Jones* as recognizing that the paramount purpose of the Fourth Amendment is to protect individual privacy rather than property and as discarding common law property concepts in determining whether privacy has been invaded in a given case. *Warden* v. *Hayden*, 387 U. S. 294. However, the Court below extracted from the *Jones* decision the phrase "anyone legitimately on the premises" and, without regard to the context in which that phrase was used, wrongly concluded that mere presence on the premises created a right of privacy and thereby conferred standing. But this Court did *not* hold that simple presence on the premises conferred standing in the absence of *any* personal interest in the premises. Indeed, to read the *Jones* case as so holding would undermine the emphasis elsewhere in the opinion on the necessity for a "legally requisite interest in the premises", 362 U. S. at page 263, in order to have standing.

Moreover, such an interpretation is illogical and unreasonable. The rationale for requiring a legally requisite interest in the premises as a prerequisite to standing to object to a search is that, in order to have standing, an individual must demonstrate that his personal right of privacy was invaded—"that he himself was the victim of an invasion of privacy." 362 U. S. at page 261. Surely the ques-

tion of whether or not an individual has a personal right of privacy in the premises cannot depend, as the Court below seemed to conclude, on whether or not he is actually present when the search occurs. For example, if Jones' right of privacy in the premises was sufficient irrespective of what common law category is used to describe it, his absence at the time of the search could not have diminished his right of privacy in the premises or made the search any less an invasion of that right which is protected by the Fourth Amendment. Similarly, in the case at bar, whatever right of privacy the respondent may have had could not have been changed if, for example, he was at lunch or on a business call somewhere else when the search occurred.

Thus, the emphasis by the Court of Appeals on the respondent's actual presence at the time of the seizure as support for its conclusion that he had standing to object to the seizure is beside the point. The Court below apparently misreads *Jones* as doing away with the necessity of showing any right of privacy in either the property seized or the premises searched and completely fails to analyze or articulate the rationale for or the nature of the respondent union officer's personal right of privacy in either the union records or the union office. Its conclusion disregards the prior decisions of this Court holding that union officials have *no* personal right of privacy in union records and, by an out of context reading of part of the language in *Jones*, provides a Fourth Amendment shelter for criminal activities of persons whose personal privacy is not invaded by the alleged illegal searches.

The Court of Appeals' reliance upon two other factors to reach its conclusion that the respondent had standing reveals an approach that is even more contrary to the decisions of this Court. It held that the respondent's personal privacy was invaded because the search was "directed at" him since the obvious purpose was to prosecute the respondent and not the union. This view was explicitly rejected by this Court in *Wilson* v. *United States*,

221 U. S. at page 385:

> "Nor is it any answer to say that in present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses."

Similarly, the Court of Appeals' conclusion that the respondent's participation in the preparation of the union records gave him a right of privacy in such records is directly contradictory to the decisions of this Court, *supra*, pages 6-7, which have held that a corporate or union officer has no personal right of privacy in corporate or union records, decisions not even mentioned, much less overruled, in *Jones*.

Whether or not the prior decisions of this Court should be rejected is a decision which should be made only by this Court especially since the Court of Appeals' conclusion is one that is not mandated by any decision of this Court, is not supportable by logic and does violence to the language of the Fourth Amendment's prohibition of illegal searches of an individual's "person, houses, papers and effects".

2. There is a conflict among the Circuit Courts of Appeals on an issue of general importance which should be resolved by this Court.

It should be emphasized that the decision of the Court of Appeals is inconsistent with prior decisions of that Court both before and after *Jones* v. *United States*. That Court has heretofore consistently held, following the reasoning of this Court, that a corporate official has no personal privilege or right of privacy in corporate books and records. See, *e.g.*, *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.); *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir.). This result has obtained even after *Jones* until the present case, the cases in the Second Circuit repeatedly holding that a corporate official's inability to demonstrate that corporate

records were his *personal* property or were seized from premises in which he had a *personal* interest deprived him of standing to challenge the manner in which the records were seized. *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906; *United States* v. *Granello*, 365 F. 2d 990 (2d Cir.), *cert. denied*, 386 U. S. 1019. See also, *United States* v. *Epstein*, 240 F. Supp. 84 (S.D.N.Y.). The decision in the instant case has thus injected considerable uncertainty into the question of standing to object to seizures of corporate books and records even in the Second Circuit and this uncertainty is compounded by the Court of Appeals' apparent decision to resolve such issues on a case-by-case basis without enunciating any generally applicable standards. Moreover, this situation in the Second Circuit is symptomatic of the highly disparate views prevailing among other Circuits in this area:

First Circuit: Fourth Amendment does not prohibit testimony describing fruits of a search by federal agents of desk of office manager who was present and objected on grounds of privacy. *Cooper's Express, Inc.* v. *I.C.C.*, 330 F. 2d 338, relying upon *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; and *Shapiro* v. *United States*, 335 U. S. 1, with no mention of *Jones* v. *United States*.

Third Circuit: Since records were not the personal property of the defendant but belonged to various corporations of which the defendant was an officer, the defendant had no standing to object to their admission in evidence. *United States* v. *Goldberg*, 330 F. 2d 30. The decision in *Jones* v. *United States* formulates rules of standing which are applicable only to possessory crimes (dictum). *United States* v. *Grosso*, 358 F. 2d 154, *cert. granted*, 385 U. S. 810, *reargument granted*, 388 U. S. 904.

Fourth Circuit: Since none of the corporate records were unlawfully seized, Fourth Amendment did not require suppression of records of corporation which the de-

fendant advised. *United States* v. *Hopps*, 331 F. 2d 332, *cert. denied*, 379 U. S. 820, which recognizes the conflict between the Fifth Circuit decisions and the Second Circuit decisions prior to the case at bar.

Fifth Circuit: Fourth Amendment requires suppression of corporate records seized from the office of the president and sole shareholder by a postal inspector who was permitted to accompany a deputy sheriff who was executing a general levy on the corporate assets; the defendant corporate president was not on the premises when the search and seizure occurred but he had prepared much of the material and the search was directed at him. *Henzel* v. *United States*, 296 F. 2d 650.

Ninth Circuit: Unlawful seizure of corporate records from home of defendant's sister-in-law did not entitled the defendant, the sole owner of the corporation, to suppression since the papers belonged to the corporation rather than to the defendant, the defendant had no interest in the premises searched and the defendant was not charged with a possessory crime; the victim of the search was the corporation, even though charges had already been filed against the defendant, and the defendant could claim no derivative prejudice. *Hill* v. *United States*, 374 F. 2d 871, *cert. denied*, —— U. S. ——, 36 U. S. L. Week 3144 (October 10, 1967, No. 318), relying upon prior decisions of the Second Circuit.

Tenth Circuit: Defendant employer was entitled to suppression of personal notebooks unlawfully seized from a common desk used by several employees at defendant's place of business since the search was "directed against" the defendant. *Villano* v. *United States*, 310 F. 2d 680, relying upon *Henzel* v. *United States*, *supra*. This decision has been interpreted as repudiating the requirement that a defendant must have some personal proprietary or possessory interest in the place or thing searched or seized. *Elbel* v. *United States*, 364 F. 2d 127, *cert. denied*, 385 U. S. 1014, *rehearing denied*, 386 U. S. 939.

District of Columbia Circuit: No personal rights of the defendant were violated by action of government agents in searching files of the House of Representatives in connection with the defendant's activities in allegedly procuring payments on false pay vouchers. *Taylor* v. *United States,* 296 F. 2d 446. Defendant, a government employee, was the victim of an invasion of privacy when the desk set aside for her exclusive personal use was illegally searched and evidence was seized, *United States* v. *Blok,* 188 F. 2d 1019, but a search of a table which was open for the common use of several employees did not violate the defendant employee's personal right of privacy. *Freeman* v. *United States,* 201 A. 2d 22 (D. C. Court of Appeals). *Cf., United States* v. *Collins,* 349 F. 2d 863 (2d Cir.), *cert. denied,* 383 U. S. 893, *rehearing denied,* 384 U. S. 947.

On the basis of this brief summary, apart from the internal conflict of Second Circuit decisions, it appears in the case at bar that standing probably would be found to exist in the Fifth and Tenth Circuits but not in the First, Third and Ninth Circuits. This Court last addressed itself directly to a Fourth Amendment standing question in 1960 in the *Jones* case. The variety and inconsistency of approaches and results by the various Courts of Appeals in the ensuing seven years has created a situation where the rights of a defendant to object to searches and seizures and the permissible scope of official action in conducting searches and seizures varies according to geographical happenstance. In the interests of securing a uniform interpretation of standing to raise a Fourth Amendment claim as well as to enunciate specific tests for determining what constitutes a sufficient right of privacy to confer standing, the decision of the Court of Appeals should be reviewed by this Court.

3. The Court of Appeals erroneously applied a new Fourth Amendment rule retroactively to a final state court judgment of conviction.

The conclusion of the Court of Appeals is, as we have shown, a significant departure from prior Fourth Amend-

ment rules enunciated by this Court. Indeed, the court below recognized that this Court has never formulated rules of standing which mandate the result in this case. The judgment of conviction in the case at bar became final after *Mapp* v. *Ohio*, 367 U. S. 643, and after *Jones* v. *United States*, 362 U. S. 257, and this Court denied certiorari to review the exact Fourth Amendment claim which the Court of Appeals has now held is a valid claim. The enunciation of new and extensively broadened rules of standing, like any other new Fourth Amendment rules, should not be made on collateral attack so as to apply retroactively to state court judgments of conviction which became final before such rules were formulated. *Angelet* v. *Fay*, 381 U. S. 643. Any such new rules should date from the time of the decision announcing the new rules for the reasons stated in *Linkletter* v. *Walker*, 381 U. S. 618.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, November 13, 1967.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIVIL 11812

UNITED STATES OF AMERICA ex rel. FRANK DEFORTE,

Relator,

vs.

VINCENT R. MANCUSI, Warden of Attica State Prison,

Respondent.

Relator, co-defendants Joseph DeGrandis and Ernest Zundel, all officers of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and twelve other defendants were indicted in Nassau County, New York, for conspiracy (Penal Law § 580), coercion (Penal Law § 530) and extortion (Penal Law §§ 850, 851). The indictment involved alleged monopolization of the juke box industry in metropolitan New York City. Trial was held in the Nassau County Court, and the jury found defendants DeForte, DeGrandis and Zundel guilty, but acquitted the remaining defendants. Subsequently the relator was sentenced to from three to five years' imprisonment. He is presently serving that sentence in Attica State Prison.

Appeals by the relator to the Appellate Division of the Supreme Court[1] and to the New York Court of Appeals[2]

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[1] *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dep't 1962).

[2] *People* v. *DeGrandis*, 12 N. Y. 2d 812 (1962).

were unsuccessful, and certiorari to the United States Supreme Court was denied.[3] A previous application for a writ of habeas corpus, on other grounds, was denied and that denial affirmed on appeal.[4] It appears that the relator, with respect to the present issues, has exhausted his available state remedies as required by Title 28 U.S.C. § 2254.

Relator's petition contains two claims (1) that evidence was received against him in the course of trial which had been seized in violation of his Fourth Amendment rights, and (2) that illegal wire-tap evidence was also improperly received. The second claim has been withdrawn. Involved in the first claim is the manner in which certain books and records of Local 266 were obtained.

It appears that these books and records were secured through the issuance, by the District Attorney's office, of a "forthwith" subpoena duces tecum addressed to Local 266.[5] The Local apparently did not surrender its books and records upon service of the subpoena but, without the consent of its officers, the books and records were taken by those serving the subpoena. The Assistant District Attorney, who has appeared in opposition to this application, has not attempted to justify this use of the subpoena.

Initially, the relator concedes that he, as a union officer, can claim no Fifth Amendment privilege with respect to the production of union records. See *United States* v. *White*, 322 U. S. 694 (1944). He notes, however, that the Supreme Court decided *Mapp* v. *Ohio*, 367 U. S. 643 (1961) before his conviction became final and, accordingly, that

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[3] *DeGrandis, et al.* v. *New York*, 375 U. S. 868 (1963).

[4] *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1963).

[5] As to the propriety of a "forthwith" subpoena under New York law, see *Amalgamated Union, Local 224* v. *Levine*, 31 Misc. 2d 416, 219 N.Y.S. 2d 851 (Sup. Ct. 1961) and *In re Atlas Lathing Corp.*, 176 Misc. 959, 29 N.Y.S. 2d 458 (Sup. Ct. 1941).

the Fourth Amendment's proscription against unreasonable searches and seizures would apply to his state court trial. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Under *Jones* v. *United States*, 362 U. S. 257 (1960), particularly as that decision is interpreted by the Fifth Circuit Court of Appeals in *Henzel* v. *United States*, 296 F. 2d 650 (1961),* relator claims that he, as an individual, has standing to challenge the seizure and use of the aforementioned union records in his state court trial.

In *Jones, supra*, the Supreme Court reviewed a narcotics conviction in which the defendant had been denied standing to move to suppress because he neither claimed ownership of the seized articles nor claimed a greater interest in the searched premises than that of an invitee or guest. Speaking in the context of Rule 41(e) of the Federal Rules of Criminal Procedure, the Court, at page 261, observed initially that:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' "

The Court went on to point out that:

> "The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy."

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* See also: *United States* v. *Birrell*, 242 F. Supp. 191, 198-201 (D.C.S.D.N.Y. 1965).

The Court then concluded that:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

However, upon reviewing the tests which the lower federal courts had applied to determine if an individual had demonstrated that he possessed the requisite interest, the Court found those tests to be deficient. In effect, those tests had pinioned a defendant, either requiring that he risk loss of his Fifth Amendment rights or, in saving his defense, encouraging that he perjure himself in order to establish his standing to assert his Fourth Amendment rights.

Finding this dilemma presupposed ". . . requirements of 'standing' we do not find compelling," the Court found that two separate lines of thought effectively sustained Jones' claim of standing. The Court, at page 263, held that where:

> "The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."

Secondly, and here speaking more generally, the Court, at page 267, held:

> ". . . that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

Appendix A.

In those cases where a Fourth and Fifth Amendment dilemma could occur, i.e., generally those cases involving contraband, the fruits or instrumentalities of a crime and resulting Fifth Amendment problems, the wisdom and fairness of the new guidelines are immediately apparent. Equally apparent, however, is the absence of any such dilemma when corporate or union books and records are involved. See *Wilson* v. *United States,* 221 U. S. 361 (1911) and *United States* v. *White, supra.*

Although no such dilemma was involved, in *Henzel* v. *United States, supra,* the Fifth Circuit Court of Appeals applying and relying upon Jones, concluded that the sole stockholder and president of a corporation, absent when his corporation's records were illegally seized, had standing to challenge the seizure. This result, and the Circuit Court's comment that the corporation's president "had an interest in the property at least as deserving of protection as the interest of the defendant Jones,'" in this court's view cannot be reconciled with existing precedents.

Not only do Henzel's holding and the aforementioned comment overlook the absence of the Fourth and Fifth Amendment dilemma to which the Jones' guidelines apply, but its holding and comment ignore the personal nature of Fourth Amendment rights. See *Hale* v. *Henkel,* 201 U. S. 43, 74-77 (1906); *Wilson* v. *United States,* 221 U. S. 361, 374-386 (1911); *Essgee Co.* v. *United States,* 262 U. S. 147, 155-158 (1923); *Mapp* v. *Ohio,* 367 U. S. 643, 655-657 (1961); *Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963); *United States* v. *DeVasto,* 52 F. 2d 26, 29 (2d Cir. 1931); *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, 636 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245, 246 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *United States* v. *Fago,* 319

' *Henzel* v. *United States,* 296 F. 2d 650, 653 (5th Cir. 1961).

F. 2d 791, 792-793 (2d Cir. 1963). That Jones' "on the premises" test is singularly inappropriate when applied to corporate books and records would appear to require little discussion.[8] Envision, for example, a case in which the corporation's janitor was present during an illegal search and seizure but the corporation's vice-president was not.

Accordingly, the court joins in the view of the Third Circuit Court of Appeals in *United States* v. *Grosso*, 358 F. 2d 154, 160-161 (3rd Cir. 1966), to the effect that the Supreme Court, in Jones, confirmed the general rule as to standing and created an exception applicable only to a limited class of cases. Specifically, for the reasons heretofore stated, the court concludes that those cases involving corporate or union books and records do not fall within that class of cases governed by Jones.

The court is convinced, therefore, that *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2d Cir. 1946); *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir. 1946); *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir. 1959) and *United States* v. *Fago*, 319 F. 2d 791 (2d Cir. 1963) are controlling authority and, accordingly, finds the relator lacks standing to raise the present objection. The writ is dismissed.

In view of the recent authority contrary to this court's holding, a certificate of probable cause for appeal is granted.

Permission to appeal in forma pauperis is denied with the qualification that the relator may file with the Clerk of the United States District Court, United States Court-

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[8] The court recognizes, however, that the Supreme Court, in the exercise of its supervisory power over the federal courts, may have reached the same result as did the Fifth Circuit Court of Appeals in Henzel. See *Ker* v. *California*, 374 U. S. 23, 31 (1963); see generally *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

house, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for permission to prosecute an appeal in forma pauperis.

So ordered.

Assigned counsel James L. Lekin has devoted much time to this matter with skill and diligence.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

Dated: November 16th, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 478—September Term, 1966.

(Argued June 1, 1967 Decided June 28, 1967.)

Docket No. 31112

UNITED STATES OF AMERICA *ex rel.* FRANK DEFORTE,

Appellant,

—v.—

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Appellee.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

KAUFMAN, *Circuit Judge:*

The sole issue presented by this appeal is whether the appellant, Frank DeForte, a vice-president of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, had "standing" to object to the use against him in a criminal prosecution of

various union books and records that admittedly were illegally seized from the union's office by state officials, over the appellant's protests.

I.

The parties have stipulated to the essential facts which are relatively simple. DeForte, Joseph DeGrandis, and Ernest Zundel, all officers of Local 266, were indicted in Nassau County for conspiracy (N. Y. Penal Law § 580), coercion (N. Y. Penal Law § 530) and extortion (Penal Law §§ 850, 851) in connection with an alleged monopolization of the juke box industry in the New York City metropolitan area. They were charged with organizing the owners of music machines and juke boxes, and exacting tribute from them in the form of what appeared to be legitimate initiation fees, dues and monthly assessments. Prior to trial, the District Attorney's Office of Nassau County issued a subpoena *duces tecum* commanding the local to produce certain books and records. When the union refused to surrender these materials, the state officials who served the subpoena seized the books and records over the protests of DeForte, who was present at the time in the union's office.[1] The search and seizure were conducted despite the absence of a search warrant, and the state has never attempted to justify the behavior of its officials. Indeed, it has admitted the illegality of their acts.

The illegal search produced significant and substantial evidence. The books and records seized consisted, in the main, of the union charter, minutes of Local 266 meetings, the local's bank book, and cancelled checks and stubs. Also taken were applications to join the union by the

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[1] We understand that the union's office was one large room in which defendant, as well as others, had their desks.

officers and other prospective members of the local. Appellant, we are told without denial, played a considerable role in the preparation of these materials. Thus, for example, all checks seized were signed by him together with two other officers; he procured and processed the applications of various members; and he made a substantial number of entries in the local's check book, ledger and records. Moreover, it is conceded that appellant was in possession and/or control of the books and records when they were seized from the union's office. That these records were not of little importance to the state's case is revealed by its admission that "most of the books and records of Local 266 which were seized were introduced into evidence."

The trial of appellant and his co-defendants resulted in the conviction of DeForte, DeGrandis and Zundel, and the acquittal of 12 other defendants named in the indictment. Appellant was subsequently sentenced to a term of from 3 to 5 years in prison. Following his conviction, DeForte appealed to the Appellate Division of the Supreme Court, Second Department, and thereafter to the New York Court of Appeals, alleging, among other points, that the search of the union's office and the seizure of its books and records were illegal, and accordingly the evidence should not have been admitted against him at trial. Both appellate courts affirmed the conviction on the ground that he lacked standing to raise this issue because the books and records were not his personal or private papers, but rather were the property of the union. *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N. Y. S. 2d 875, *aff'd*, 12 N. Y. 2d 812, 236 N. Y. S. 2d 63 (1962). Certiorari to the United States Supreme Court was subsequently denied 375 U. S. 868 (1963).

Having exhausted his state remedies, appellant applied for a federal writ of habeas corpus on an alleged "coercion

of the jury'' claim. His application was denied, and that denial was affirmed by this Court.[2] DeForte then filed a second application in the District Court alleging first, that the books and records used against him during the trial had been seized in violation of his Fourth Amendment rights, and second, that illegal wiretap evidence also had been improperly admitted. The latter claim was withdrawn, while the former was never considered on the merits because Judge Henderson's denial was grounded on his belief that DeForte lacked standing to raise this objection. It is from this denial that he appeals.[3]

II.

The quest for a clear solution to the perplexing query as to who may challenge an allegedly unlawful search and seizure has been confounded by thorny problems. For nearly 50 years we followed the precept that while evidence secured by federal officers as the result of an illegal search and seizure could not be used in a federal prosecution, *Weeks* v. *U. S.*, 232 U. S. 383 (1914), not all defendants had standing to challenge this evidence. Then, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we were told that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment and

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[2] In his first application, DeForte alleged that he was denied due process because the judge, after delivering a 3½ hour charge, kept the jury in deliberations for 24 consecutive hours, although the jury twice advised the court of its fatigue. *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1964). (In the state Court of Appeals, Desmond, *C.J.*, Fuld and Froessel dissented from the affirmance and voted to reverse because they were of the view that this constituted "coercion of the jury as matter of law.")

[3] The District Judge, recognizing that there was recent authority contrary to his holding, granted a certificate of probable cause.

had to be enforced by the same exclusionary rule found in the federal courts.[4] Thus, the states were confronted with this same "standing" problem, and were compelled to apply the rules that had been developed in the federal courts in determining this question. See *U. S. ex rel. Coffey* v. *Fay*, 344 F. 2d 625, 628 (2d Cir. 1965).

In the pre-*Mapp* era, the federal rule seemed to be that in order to have standing to challenge the legality of evidence allegedly obtained in violation of the Fourth Amendment, a defendant must "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones* v. *U. S.*, 362 U. S. 257, 261 (1960). See generally R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471-86 (1952). But, some relaxation of this quite stringent standard seemed to be in the making even prior to *Jones*. In *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948), the Supreme Court held that a defendant had standing to suppress evidence that had been illegally taken from a co-defendant, who had moved unsuccessfully to suppress, because "if the property had been returned [to the co-defendant] . . . it would not have been available for use at the trial." But see *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963). And in *U. S.* v. *Jeffers*, 342 U. S. 48 (1951), the Court ruled that a defendant who had stored narcotics in

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[4] The exclusionary rule of *Mapp* applied to state court convictions that had not become "final" before that decision was rendered. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Finality in this context means "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp* v. *Ohio*." 381 U. S. at 622 n. 5. DeForte's petition for a writ of certiorari was not denied until October 1963, after *Mapp* was decided. He was entitled, therefore, to the benefits of the exclusionary rule if he had standing to challenge the legality of the search and seizure.

a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunts' room. The Court added that "to hold that this search and seizure were lawful as to the respondent [because the search did not invade his privacy] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.* at 52. But it was not until *Jones* v. *U. S.*, *supra*, that the Supreme Court attempted to articulate some standards to guide the courts in this difficult area. A careful examination of that case is therefore essential to a proper resolution of the issues now before us.

III.

Jones was arrested by police officers who possessed a warrant to search for narcotics in an apartment belonging to Evans, his friend. Evans had given Jones the use of the apartment, and a key with which he admitted himself on the day of the arrest. Though his home was elsewhere, Jones had a shirt and suit at the apartment, and had slept there "maybe a night." 362 U. S. at 259.

Prior to trial, Jones moved to suppress the narcotics and paraphernalia seized by the officers, claiming that their warrant had been issued without a showing of probable cause. The government challenged defendant's standing to raise this issue on the ground that he failed to allege "ownership" of the seized goods, or an interest in the searched premises greater than that of an "invitee or guest." The District Court and the Court of Appeals adopted this argument which permitted the receipt in evidence of the seized material.

The issue squarely presented to the Supreme Court was whether Jones was a "person aggrieved" within the mean-

ing of Rule 41(e) of the Federal Rules of Criminal Procedure,[5] and accordingly had standing to make a motion to suppress pursuant to that rule. Speaking for a unanimous Court,[6] Justice Frankfurter observed that:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" *one must have been a victim of a search or seizure, one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." Hatch v. Reardon, 204 U. S. 152, 160. . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

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[5] Rule 41(e) provides in part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. . . .

As this Court has previously noted, in an opinion by Judge Waterman, "because the rule is . . . rooted in basic constitutional principle, the same test presumably governs standing to suppress evidence in a state prosecution." *U. S. ex rel. Coffey* v. *Fay,* 344 F. 2d at 628.

[6] Mr. Justice Douglas, though concurring in the Court's resolution of the issue of standing, dissented from the majority's finding that there was probable cause for the issuance of the warrant. 362 U. S. at 273.

> as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, ***that he himself was the victim of an invasion of privacy.***
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> 362 U. S. at 261. (Emphasis added.)

But, Justice Frankfurter went on to note that prosecution for certain crimes of possession posed a dilemma. He reasoned that if, in order to establish standing to suppress illegally seized evidence, a defendant were required to allege ownership of the seized contraband or an interest in the premises where it was found, these very allegations might later be used at the trial to establish his guilt. Moreover, if a defendant alleged possession for purposes of establishing standing, and later denied this at trial, he would be faced with a perjury charge.

In order to eschew this quandary, the Court found that "*two separate lines of thought* effectively sustain defendant's standing in this case." 362 U. S. at 263. (Emphasis added.) First, when possession is sufficient to convict a defendant of the crime charged, he need not show an interest in the premises searched or in the property seized in order to have standing to move for suppression. And second, "even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the courts below." *Ibid.*

In connection with the second ground, the Court rejected the technical distinctions which lower courts had borrowed from the law of property and had applied to the issue of standing.[7] Such distinctions were inconsistent with the

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[7] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the

(Footnote continued on following page)

protections guaranteed to those charged with crimes. Moreover, "no just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on the premises when a search occurs* may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U. S. at 267. (Emphasis added.)

Thus, *Jones* dramatically liberalized the standing requirement for challenging the legality of searches and seizures. But while the case informs us as to what is *not* required to confer standing, the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what *is* required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for

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(Footnote continued from preceding page)

Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession' [citing cases]. The necessary quantum of interest has been distinguished as being, variously, 'ownership in or right to possession of the premises' [citing case], the interest of a 'lessee or licensee' [citing case], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

efficient and vigorous police protection. It appears that a proper balance can be struck only on a "case-by-case basis." *See* v. *City of Seattle*, 35 U. S. L. Week 4522, 4524 (U. S. June 5, 1967).

IV.

With this background of the law's evolution on "standing," it is appropriate for us to re-examine the facts in this case. While the state insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the state officials was actually "directed" at DeForte. The allegedly improper activities which the state was attempting to curtail could be halted only by prosecuting DeForte and his fellow union officials. Little would have been gained by prosecuting or fining the union alone, or even driving it to extinction, for the guiding culprits would have remained free to conduct their illegal activities through a different proscenium. (Indeed, the union was not even indicted.) That the state recognized this actuality is clearly evidenced by its placing of "monitors" on the local's telephone in order to overhear conversations of the appellant and other individuals operating behind the union facade. In these circumstances we would be myopic not to recognize that appellant was "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else." *Jones* v. *U. S.*, 362 U. S. at 261.[8] Com-

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[8] In *U. S. ex rel. Coffey* v. *Fay, supra*, we held that where stolen jewels had been seized from Coffey's companion, Kingdom "Bill" DeNormand, at the time he and appellant were arrested in the latter's car, the search was "directed against" Coffey. 344 F. 2d at 628-29. In that case, however, the appellant was confronted with the dilemma discussed in *Jones*, since he was being prosecuted for possession of stolen property.

pare *U. S.* v. *Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965), *motion for reargument granted and decision affirmed*, 243 F. Supp. 36 (S. D. N. Y. 1965), with *U. S.* v. *Re*, 372 F. 2d 641 (2d Cir.), *cert. denied*, 35 U. S. L. Week 3475 (1967).

But, in the circumstances present here, the admittedly illegal search was not only "directed" at appellant, it also invaded his right of privacy—the basic right the Fourth Amendment is designed to protect. See *Camara* v. *Municipal Court*, 35 U. S. L. Week 4517, 4518 (U. S. June 5, 1967); *Warden* v. *Hayden*, 35 U. S. L. Week 4493, 4495 (U. S. May 29, 1967). While much has been written on the Fourth Amendment's guaranty of the individual's right to be secure in his "home," it is now well established that the freedom from unreasonable searches and seizures extends to one's place of business as well. See *Berger* v. *N. Y.*, 35 U. S. L. Week 4649, 4655 (U. S. June 12, 1967); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle*, 35 U. S. L. Week at 4523.

It is undisputed that DeForte was actually present in the union's office at the time of the illegal search and seizure. This office also served as his place of business and in which he spent a considerable part of each day. It appears to us to have been a clear invasion of privacy for the state's officials to have descended upon what was the union's office *de jure*, but DeForte's office *de facto*, and without a warrant and over his vigorous protests to have seized books and records, a substantial portion of which he had prepared and which were in his custody. We do not believe that in these circumstances any just interest of the Government in the effective and rigorous enforcement of the criminal law is hampered by recognizing that one situated as DeForte may challenge the legality of a search. See *Jones* v.

U. S., 362 U. S. at 267. Accordingly, he had standing to move for the suppression of the fruit of the illegal search, and the use of these books and records against him at his trial requires that his conviction be set aside.[9]

V.

We note that the cases cited by the state as enunciating a different principle are inapposite or clearly distinguishable. In *U. S.* v. *Bozza*, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that "the values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of 'victims' *in the broad sense the Supreme Court has given that term . . . .*" *Id.* at 223. (Emphasis added.)

Similarly, in *U. S.* v. *Grannello*, 365 F. 2d 990 (2d Cir. 1966), the papers which appellants were attempting to suppress had not been seized from them; nor had they contributed in any way to their preparation. And in *U. S.* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906

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[9] The state argues, and appellant readily concedes, that the union could have been compelled to submit its books and records pursuant to a subpoena, and that if these materials had been legally obtained, DeForte's Fifth Amendment right against self-incrimination would not have prevented this evidence from being used against him. See *U. S.* v. *White*, 322 U. S. 694 (1944); *Wilson* v. *U. S.*, 221 U. S. 361 (1911). But, just as a search cannot be justified by the potent evidence it produces, see, e.g., *U. S. ex rel. Rogers* v. *Warden*, —— F. 2d —— (2d Cir., June , 1967), so too an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means.

(1963), the corporate records in question had been *lawfully* obtained by the District Attorney of Erie County "for a purpose wholly unrelated to the subsequently initiated federal inquiry," *id.* at 792, and then were turned over to officials of the Internal Revenue Service.

The other cases relied upon by the state (*U. S.* v. *Guterma,* 272 F. 2d 344 (1969); *U. S.* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, *cert. denied,* 329 U. S. 742 (1946); *U. S.* v. *DeVasto,* 52 F. 2d 26, *cert. denied,* 284 U. S. 678 (1931)), were decided prior to *Jones,* and are, therefore, precedents of dubious value. More in point, we believe, is *Henzel* v. *U. S.,* 296 F. 2d 650 (5th Cir. 1961), which is in accord with our holding here.[10]

VI

Finally, we observe that our decision is consonant with the rationale of the exclusionary rule which is "to deter—

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[10] Henzel was the sole shareholder and president of the Chemoil Corporation whose property was searched by a postal inspector without a warrant. The Court of Appeals concluded that it was not decisive of the suppression issue raised that "the property seized and the premises searched in this case were owned by a corporation rather than by an individual. Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U. S. 385 . . . there is nothing in the corporate status . . . which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." 296 F. 2d at 652. Although Henzel was not present when the illegal search and seizure occurred, the court found that the search was "directed at" him. The fact that he had prepared much of the material seized and spent the greater part of each day in his office gave him a sufficient interest in the property to have standing. This conclusion would appear to be *a fortiori* in our case where the appellant was actually present when the search occurred. See also *Villano* v. *U. S.,* 310 F. 2d 680 (10th Cir. 1962). But see *U. S.* v. *Grosso,* 358 F. 2d 154 (1966), in which the Third Circuit apparently concluded that the rationale of *Jones* should be limited to those cases in which a dilemma is posed because the defendant has been charged with a possessory crime

to compel respect for the constitutional guaranty [against unreasonable searches and seizures] in the only effective way—by removing the incentive to disregard it." *Elkins* v. *U. S.*, 364 U. S. 206, 217 (1960). The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy.[11]

We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mechanical and unreflective application of new or old formulations, and neglect of the differences between cases

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[11] The fact that such deterrence is achieved at a high price—the suppression of relevant evidence—has led some observers to conclude that the exclusionary rule should be selectively applied by imposing rather strict standards for standing. See, e.g., R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567 (1957). At the other end of the spectrum, however, many commentators have argued that the standing requirement should be liberalized, or even abolished so that all evidence obtained as the result of an unreasonable search and seizure would be excluded in criminal prosecutions. See, Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342 (1967); F. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1 (1950); R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319.

Proponents of this latter view argue quite forcefully that since the exclusionary rule seeks to deter illegal conduct by the removal of incentives, its prophylactic effect is diminished whenever the prosecution is allowed to introduce the fruit of an illegal search. California, however, is the only state whose highest court has eliminated the standing requirement. See *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955) (Traynor, *J.*). This Court has refused to take such a step. See *U. S.* v. *Bozza*, 365 F. 2d at 223.

leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have *not* concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have *not* held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were "directed" at appellant, and that his right of privacy was invaded by the unwarranted action of the state officials. In these circumstances we can discern no legitmate reason for denying DeForte standing.[12]

The Court wishes to express its appreciation to assigned counsel, James L. Lekin of Buffalo, New York, for the time and skill which he devoted to this appeal.

Order reversed and case remanded to the District Court for issuance of the writ of habeas corpus.

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[12] In light of our conclusion, we find it unnecessary to consider appellant's alternate argument that the decision of the Supreme Court in *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920), also requires us to reverse.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

PETITION FOR REHEARING

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

Petition denied.

S. R. W.

J. J. S.

I. R. K.

U. S. C. JJ.

AUG 25 1967

Appendix C.

UNITED STATES COURT OF APPEALS

For the Second Circuit

United States of America ex rel. Frank De Forte,

Petitioner-Appellant,

v.

Vincent R. Mancusi, Warden of Attica Prison,
Attica, New York,

Respondent-Appellee.

Petition for Rehearing In Banc

Louis J. Lefkowitz, Attorney General
of the State of New York, New York,
N. Y., for respondent-appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. Edward Lumbard,
Chief Judge

25 August 1967

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 11,812

ORDER

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE

Relator

vs

VINCENT R. MANCUSI, Warden, Attica State Prison

Respondent

The above relator having appealed to the United States Court of Appeals for the Second Circuit from the order of this Court filed November 16, 1966, and said appeal having been heard by the United States Court of Appeals for the Second Circuit which, on the 28th day of June, 1967, issued its order reversing the order of the District Court and directing that the action be remanded with instructions that the writ of habeas corpus shall be issued, and said order having been received and filed in the Office of the Clerk of this Court on the 29th day of August, 1967, it is now,

ORDERED, ADJUDGED and DECREED that the order of the United States Court of Appeals for the Second Circuit issued in this matter on the 28th day of June, 1967, and filed in this Court on the 29th day of August, 1967, is hereby made the order of this Court, and it is further

Appendix D.

ORDERED, ADJUDGED and DECREED that pending review of the Decision of the United States Court of Appeals for the Second Circuit, relator is immediately enlarged upon his own recognizance from the custody of the New York State Board of Parole. In the event the Decision of the United States Court of Appeals for the Second Circuit is reversed, relator shall be returned to the custody of the New York State Department of Correction for completion of the unexpired portion of his sentence, and it is further

ORDERED, ADJUDGED and DECREED, that in the event the Decision of the Court of Appeals for the Second Circuit is affirmed, or certiorari is denied, or no appeal is taken from the aforesaid Decision within the prescribed time, the relator is discharged unless the authorities for the State of New York, within a reasonable time, grant the relator a new trial.

JOHN HENDERSON
United States District Judge

Dated: September 21, 1967